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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 514

WILLIAM MacDONALD, JAMES J. COLEMAN,
R. E. MacDONALD, ET AL.,
Petitioners,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

M. WALTON HENDRY,
BERNARD J. GALLAGHER,
J. ROY THOMPSON, JR.,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 514

WILLIAM MacDONALD, JAMES J. COLEMAN, R. E. MacDONALD, O. E. SCHAEFFER, R. J. MOORE, HARRY F. WEINBERGER, AND GEORGE E. GILMORE, CO-PARTNERS, DBA TARLTON-MacDONALD COMPANY,

Petitioners and Plaintiffs Below,

vs.

THE UNITED STATES,

Respondent and Defendant Below

THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

To the Honorable the Chief Justice and Associate Justices of the United States:

Appellants respectfully petition that a writ of certiorari issue to review the judgment of the Court of Claims of the United States, entered in the above cause on May 2, 1949, and order entered October 3, 1949, overruling petitioners' motion for a new trial.

Statement of the Matter Involved

On May 19, 1942, petitioners entered into a contract with respondent for the construction of a Modification Center, a large building for the housing of airplanes being equipped for combat service (Rec. 7, 25, 26). The bid was conditioned upon agreement of respondent to "furnish all priority that will be required to enable us to obtain without delay all materials and equipment."

The lumber required was of lengths and sizes unusual and, therefore, was extremely difficult to obtain during the war period, and the work was being seriously delayed. In order to avoid this delay, the respondent's Contracting Officer, under the authority conferred upon him by Article 3 of the Contract (Rec. 8), ordered and instructed petitioners to procure the lumber at once from whatever sources it could be secured, at whatever price they could purchase the same, even though such action resulted in duplicate orders; and further instructed petitioners not to cancel orders that petitioners had placed through respondent's Central Procurement Agency, but directed petitioners, also, to accept such lumber as might be shipped to it through this agency, from time to time. The Contracting Officer promised in writing that, if more lumber was secured from the above sources than was necessary to complete petitioners' contract, respondent would accept it for use on other projects and pay the cost of such lumber and would, also, pay petitioners whatever excess costs were incurred in purchasing the lumber for use on petitioners' contract, above what it would have cost petitioners through the respondent's Central Procurement Agency (Rec. 26-30, both inclusive, 37).

Upon completion and acceptance of the contract work, there developed a disagreement between the Contracting Officer and petitioners as to the correct amount of the set-

tlement growing out of the purchase of the lumber, as ordered by respondent's Contracting Officer. Petitioners claimed $25,000.00 for the excess cost of lumber, including other items; whereas, the Contracting Officer's figure was approximately $15,000.00. Petitioners and the Contracting Officer thereupon reached a compromise whereby it was agreed there was due petitioners the total sum of $17,363.27 (Rec. 29-31). Pursuant thereto, Change Order 33 was drawn up by the Contracting Officer and executed by him and petitioners.

Thereafter, respondent's Division Engineer, without any authority whatever, set aside the compromise agreement, Change Order 33, over petitioners' protest, and allowed petitioners only $9,751.45, leaving a balance due, in accordance with the terms of the compromise agreement, Change Order 33, of the sum of $7,611.82 (Rec. 30-32; Court's Find. 19 to 23, both inclusive).

Under the terms of the Contract, the Contracting Officer had sole authority to bind the respondent as the power of Superior Officers to disapprove his action was eliminated from the Contract before signing (Rec. 26, Find. 7).

The Court of Claims held that the agreement on the part of the respondent's Contracting Officer, to pay petitioners the excess cost of the lumber purchased for use on their contract, over what it would have cost petitioners in obtaining this lumber through the Central Procurement Agency was without consideration and invalid; and, further, because this item was included in the compromise agreement, the Court of Claims disregarded and held for naught the compromise agreement, Change Order 33 (Rec. 38).

Jurisdiction

The judgment of the Court of Claims of the United States, to be reviewed, was entered on the 2d day of May, 1949, and

appellants' motion for new trial was overruled on October 3, 1949.

The jurisdiction of this Court is invoked under Section 288, Title 28, U. S. Code, Annotated.

Statutory Provisions Involved

The statutory provision involved is Section 201 of the First War Powers Act of 1941. 55 Stat. 838, 834 and Executive Order 9001 issued thereunder.[1]

---

[1] *Section* 201.—The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: *Provided,* That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting: *Provided further,* That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: *Provided further,* That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest.

Executvie Order 9001, December 27, 1941. The War Department, the Navy Department and the U. S. Maritime Commission may by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may make advance progress and other payments under such contracts, of any percentage of the contract price and may enter into agreements with contractors and/or obligors, modifying or releasing accrued obligations of any sort, including liquidated damages or liability under surety or other bonds, wherever, in the judgment of the War Department, the Navy Department or the United States Maritime Commission, respectively, the prosecution of the war is thereby facilitated. Amendments and modifications of contracts may be *with or without consideration* and may be utilized to accomplish the same things as any original contract could have accomplished hereunder, irrespective of the time or circumstances of the making of, *or the form of,* the contract amended or modified, or of the amending or modifying contract and, *irrespective of rights* which may have accrued under the contract and the amendments or modifications thereof (italics ours).

Questions Presented

The questions of wide and general importance which will be presented, if this petition be granted, are these:

1. Is a common-law consideration a prerequisite to support a modification of a pending Government contract during the late war, entered into during the war to facilitate the prosecution of the war, in the form of a change order duly executed by competent parties in view of Sec. 201 of the First War Powers Act of 1941 (55 Stat. 838) and Executive Order 9001 issued thereunder?

2. Can the Government escape liability on the ground of lack of consideration for a written promise by its duly authorized Contracting Officer having sole authority under the contract to make changes thereunder, to pay petitioners the excess cost incurred solely by reason of compliance with that Officer's lawful order to purchase double the quantity of lumber required for the contract *at once,* regardless of price, wherever obtainable and (in some cases) especially fabricated, whereby the Government obtained earlier completion of an urgent war contract and also a surplus of lumber for its own use on other projects during the war period when lumber was scarce and difficult to procure?

3. Can a governmental superior officer, merely because he is a superior officer, lawfully direct a contracting officer who under the contract has sole and full authority to and does enter into a binding contract, to vacate and hold for naught such a contract?

4. Can the Govenrment escape liability under a compromise agreement in the form of a change order issued by its duly authorized Contracting Officer who had sole authority to make changes under the contract, which change order was duly signed by both the Contracting Officer and petitioners?

Reasons Relied upon for the Allowance of the Writ

1. This case involves the interpretation and application of Sec. 201 of the First War Powers Act of 1941 and Executive Order 9001 issued thereunder.

2. The decision of the Court of Claims in the instant case is in conflict with all prior decisions interpreting this Act and Executive Order 9001 issued thereunder and the decisions on the point at issue.

3. The Court of Claims has erred in the application of fundamental rules of law governing Government Contracts, viz.: (a) Erroneous conceptions of what constitutes at common law consideration for the modification of a Government Contract; (b) The erroneous conception that a compromise agreement in the form of a change order or modification of a contract duly executed by the proper parties is invalid because the compromise agreement contained an item which, in the opinion of the Court, was an invalid claim. The opinion of the Court of Claims in the instant case is in conflict in this respect with the decision of this Court in the case of *Hennessy* v. *Bacon*, 137 U. S. 78, 85; 34 L. ed. 605, and also with the decisions of the Court of Appeals, Eighth Circuit, in the case of *Daly* v. *Busk Tunnel Ry. Co.*, 129 F. 513, 521.

4. The Court of Claims erred in holding that a superior officer had the power or authority to set aside and hold for naught a binding compromise agreement in the form of a change order duly executed by petitioners and the Contracting Officer who had sole authority under the contract to issue and execute such a change order.

WHEREFORE, your petitioners pray that a writ of certiorari be issued under the Seal of this Court, directed to the Court of Claims of the United States, in the case entitled

William MacDonald, James J. Coleman, R. E. MacDonald, O. E. Schaeffer, R. J. Moore, Harry F. Weinberger and George E. Gilmore, Co-Partners, dba Tarlton-MacDonald Company *vs.* The United States, No. 46505, to the end that this cause may be reviewed and determined by this Court; that the judgment and order of said Court of Claims be reversed by this Honorable Court.

Respectfully submitted,

M. Walton Hendry,
Bernard J. Gallagher,
J. Roy Thompson, Jr.,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 514

WILLIAM MacDONALD, JAMES J. COLEMAN, R. E. MacDONALD, O. E. SCHAEFFER, R. J. MOORE, HARRY F. WEINBERGER, AND GEORGE E. GILMORE CO-PARTNERS, DBA TARLTON-MacDONALD COMPANY, *Petitioners,*

vs.

THE UNITED STATES,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Preliminary Statement

The opinion below, the statement of the matter involved, jurisdiction and statutory provisions involved and the questions presented, appear in the petition for a writ of certiorari herein and, in the interest of brevity, are incorporated here by reference.

II. Summary of Argument

Point 1. The holding of the Court of Claims that petitioners are not entitled to recover the excess costs for lumber purchased on the ground that there was no consideration for the promise of respondent's Contracting

Officer to pay petitioners for the increased costs in purchasing the lumber in question for petitioners' use under their pending contract, and, also, for respondent's use on other projects is immaterial to the issues in this case and an improper basis for the dismissal of petitioners' petition, for the reason that the order of respondent's Contracting Officer, to purchase this lumber, was an order coming within the purview of the First War Powers Act of 1941, Section 201 and Executive Order 9001, issued thereunder, which required no consideration for such an order changing and modifying the pending contract.

If the orders of the Contracting Officer to purchase this lumber at once did constitute an order coming within the purview of the First War Powers Act of 1941, Section 201, Executive Order 9001, issued thereunder, then no consideration whatsoever was necessary to validate the orders of the Contracting Officer, including the Compromise Agreement, Change Order 33; and the Court was, therefore, in error in setting aside the Compromise Agreement, Change Order 33 (Rec. 31, 32, Find. 20-22, both inclusive, 38), on the ground of lack of consideration. We submit that the orders of the Contracting Officer came within the purview of the First War Powers Act of 1941, Section 201, Executive Order 9001 issued thereunder.

In the case of *Dorsey* v. *Oregon Motor Stages,* 194 P. (2d) 966, the Supreme Court of the State of Oregon carefully analyzed Section 201 of the First War Powers Act of 1941 and Executive Order 9001, issued thereunder, with respect to the question at issue herein; and what constitutes an order under that Act and Executive Order 9001. In this case, the Court held (p. 976) that the purpose of Section 201 of the First War Powers Act and Executive Order 9001 was to enable those who were subordinate to the President, to contract freely for all supplies and services needed to facilitate the prosecution of the

war; and, in support of its opinion, referred with approval to the case of *Roxford Knitting Company* v. *Moore and Tierney, Inc.*, 265 F. 177, 11 A. L. R. 1415, cert. den. 253 U. S. 498, 64 L. ed. 1032, stating that that case had many points in common with the essential points in consideration. In this latter case, in construing the National Defense Act of June 3, 1916, 50 U. S. C. A., paragraph 80, the Court of Appeals, Second Circuit, held that the essential order need not be in any particular form nor be given by the President, himself, but could be given by his subordinates; and that, if the conditions justified the order, due to war conditions, this was sufficient.

In its opinion in the *Dorsey* v. *Oregon Motor Stages* case, *supra*, the Supreme Court of Oregon pointed out that the First War Powers Act of 1941, Section 201 and Executive Order 9001, issued thereunder, was analogous in the following essential points, to the National Defense Act as construed by the Second Court of Appeals in the *Roxford Knitting Company* case, *supra:* the essential order need not be given in any particular form; the order may be given by a subordinate; it is not necessary to constitute such an order to make a finding that the order was given to facilitate the prosecution of the war; but that, if the conditions and circumstances existed which justified such an order, that was sufficient. In the instant case, there is no question but that the Contracting Officer was a proper officer to give the order and that the conditions existed, such as would justify such an order. The Court of Claims in the instant case held that this was a war contract, that "it was a rush job." The Modification Center was being built to house combat airplanes, which were urgently needed for the war (Court's Find. 9, Rec. 26). The Court has further found (Court's Find. 2 to 5, Rec. 25, 26) that petitioners were requested to submit a bid within two days for this project, and the transaction was closed by

telegram, showing the necessity for speed, and that speed was paramount.

The Court of Claims held that from Article 3 of the formal Contract there was deleted, prior to the execution, the following provision, to wit:

> "No change involving an estimated increase or decrease of more than $500.00 shall be ordered unless approved in writing by the Head of Department or his duly authorized representative" (Court's Find. 7, Rec. 26).

It will be noted that under Article 3 of the Contract, the Contracting Officer is given authority to make changes in the Contract. Since, therefore, in the instant case, the provision in the Contract which required the approval of the Head of the Department or his authorized representative, of changes made by the Contracting Officer, involving an estimated increase or decrease of more than $500.00 was specifically deleted from the Contract prior to the execution thereof, it is plain that, under the terms of the Contract, the Contracting Officer was vested with sole power and authority to make changes in the Contract in writing, in any amount and, therefore, he alone had the power, under the Contract, to make the change in the Contract, which he did in giving orders to the petitioners for the purchase of the lumber in question.

We respectfully submit, therefore, that petitioners' case comes clearly within the *Dorsey* v. *Oregon Motor Stages* and *Roxford Knitting Company* cases, *supra*. (1) It has been shown that the Contracting Officer had sole authority, as a subordinate of the President, to make a change under the contract and give the order which he gave to petitioners in this case, to purchase its lumber; (2) It has been shown that the emergency existed and that the orders of the Contracting Officer could not have been given for any

other purpose than to facilitate the prosecution of the war; (3) The orders of the Contracting Officer were in no uncertain terms; and, by these orders, petitioners were clearly led to believe that they had no alternative but to comply with these orders. The Court of Claims has quoted in its findings the numerous letters which respondent's Contracting Officer wrote petitioners, in which in numerous instances he stated:

> "These *orders* and authorizations are given you" * * * "inasmuch as the Government is *ordering you* to purchase this lumber" * * * "Thus you will not be hurt financially by these *orders making you purchase at once.*" (Italics ours.)

There is, therefore, no mistaking of the fact that plaintiffs were ordered in no uncertain terms to comply with these orders.

For the reasons stated, and under the authority of the cases cited, we respectfully submit, therefore, that the orders of the Contracting Officer in the instant case, making petitioners buy this lumber at once, wherever they could get it, regardless of price, for use on this urgent, pending war contract, during the war period, and also for the use of respondent on other projects with which petitioners have no connection, and directing them where and at what prices to purchase, was plainly an order within the purview of Section 201 of the First War Powers Act and Executive Order 9001; and that the Court of Claims was, therefore, in error in holding that the petitioners were not entitled to recover the excess costs incurred in purchasing the lumber in question on the ground that there was no consideration for the promise of the Contracting Officer, to pay for such excess costs.

Point 2—The Court of Claims erred in holding that there was no consideration for the promise of the Contracting

Officer, to pay for the excess cost of lumber purchased by petitioners, pursuant to the orders of the Contracting Officers.

In its opinion the Court of Claims held that:

> "* * * plaintiff had done nothing more than it was required to do under the contract." (Rec. 38)

This excerpt from the Court's opinion refers to the lumber which petitioners bought for use in their own contract, upon the promise of the Contracting Officer that he would pay petitioners for the excess costs of procuring the same.

We fully agree with the Court's conclusion that:

> "Plaintiff's contract was for a lump sum and it was required to do whatever might be necessary in order to perform it." (Rec. 38)

But we do not agree that, in carrying out the orders of the Contracting Officer to purchase this lumber, plaintiff did "nothing more than it was required to do under the contract." In Court's Finding 15 (Rec. 28, 29), it is noted that the second paragraph of the letter from the Contracting Officer, referred to, reads as follows:

> "These are your instructions and your authorization to purchase these timbers *at once* from the *Union Pacific Railway Company for your job.*" (Italics ours)

In Court's finding 17, Record 29, 30, the Court quotes from a letter of the Contracting Officer, in which that officer stated:

> "Inasmuch as the central procurement orders have not arrived, and inasmuch as it is absolutely imperative that *we purchase* lumber elsewhere outside of the central procurement *at once* in order to keep your job going, these *orders* and authorization are given you * * * Inasmuch as the government is *ordering you* to purchase this lumber out (in some cases even having

> the heavier timbers fabricated); necessitating the payment of higher prices for lumber • • • Thus you will not be hurt financially by these *orders, making you purchase at once* wherever you can get these items." (Italics ours)

It will be noted that we have emphasized with italics the fact that the Contracting Officer not only authorized, but *ordered,* petitioners to purchase this lumber "*at once.*" We submit that there was no contract obligation on the part of the petitioners to purchase any of this lumber "*at once*" and pay whatever price it was necessary to pay to get it "*at once.*" We agree with the Court's statement in its opinion (Rec. 38), that:

> "Plaintiff was required to secure the lumber from whatever source it could obtain it and to pay therefor whatever price it had to pay";

but we submit that petitioners were not required to do this "*at once*" or *wherever or whenever* ordered by the Contracting Officer to do it. Petitioners had the undoubted right, under its contract, even at the risk of delay or of paying liquidated damages, to take whatever time they considered necessary in purchasing this lumber in order to save cost on the same.

Furthermore, petitioners were not required, under their contract, to purchase lumber from whatever firm defendant's Contracting Officer selected or from whom the Contracting Officer directed him to purchase the same; nor were petitioners, under their contract, required to get the approval of any purchases they made from the Contracting Officer before the purchase was consummated, yet, in Court's Findings 13 and 18, Record 27, 30, both inclusive, it is clear that it was necessary for petitioners to obtain the approval of the Contracting Officer, not only of *the prices*

paid for the lumber but *the sources* from which it was obtained.

In the excerpt from the Contracting Officer's letter, quoted in Court's Finding 17, Record 29, 30, it will be further noted that defendant ordered petitioners not only to make purchases at certain prices but, also,

> "in some cases even having the heavier timbers fabricated."

There is not one word in petitioners' contract, which required petitioners to purchase lumber at certain prices or have the heavier timbers fabricated if petitioners had difficulty in obtaining the timbers in question. True, petitioners were required to get the material called for in the contract; and, if it became impossible to get it unless it was fabricated, to have it fabricated, but there is nothing whatever in the Record to show that it was impossible for petitioners to obtain the heavier timbers except by having them fabricated. Petitioners had the unquestioned right under their contract to take whatever time petitioners deemed necessary to buy the heavier timbers, in order to avoid the expense of having them fabricated.

The Court of Claims further found:

> "The contracting officer thereupon instructed plaintiff, without cancelling its previous orders through Central Procurement Agency, to procure lumber from other sources wherever possible, even though such action resulted in duplicate orders." (Rec. 27)

Was there anything in petitioners' Contract, which required them to order double the quantities of lumber that they needed on the project? Clearly there was no such provision in the Contract; and, clearly, the giving of duplicate orders was, therefore, more than petitioners were required to do under the terms of the contract. We submit, there-

fore, that the Court of Claims is in error in holding (Rec. 38) that:

> "* * * plaintiff had done nothing more than it was required to do under the contract."

Williston on Contracts, Revised Edition, Volume 1, paragraph 102, states:

> "The requirement ordinarily stated for the sufficiency of consideration to support a promise is in substance a *detriment* incurred by the promisee or a benefit received by the promissor at the request of the promissor * * * that a *detriment* suffered by the promisee at the promissor's request, and as the price for the promise, is sufficient *though the promissor is* not *benefitted,* is well settled." (Italics ours)

In paragraph 102 A, same edition, the same author states:

> "It would be a detriment to the promisee in a legal sense if he at the request of the promissor, and upon the strength of that promise, had performed any act which occasioned him the *slightest trouble or inconvenience* and which he was not obliged to perform * * * It means giving up something which immediately prior thereto the promisee was privileged to keep or doing or refraining from something *which he was privileged not to do* or refrain from doing. And the benefit correspondingly must mean the receiving as the exchange for his promise of some performance or forbearance which the promissor was not previously entitled to receive; *that the promissor desired it for his own advantage* and had no previous right to it is enough to show that it was beneficial." (Italics ours)

In paragraph 131 B, same edition, the same author further states:

> "On any theory of consideration it is to be noticed that if the act, the performance of which or the promise of which, is a consideration for the new agreement, dif-

> fers in any respect from the act which the double contractor was under a previous obligation to perform, his second agreement is binding for the difference *however trivial* is enough to make a new performance *detrimental* or the new promise a promise of *something detrimental.*" (Italics ours)

Again, Professor Williston, in his work on Contracts, Volume 3, Edition 1936, paragraph 680, says:

> "If in any case the substituted performance given or agreed to be given is different from that originally contracted for, and is not merely less, the later agreement is supported by sufficient consideration and is unquestionably binding."

The Circuit Court of Appeals of the Tenth Circuit in the case of *Petroleum Refractionating Corporation* v. *Kendrick Oil Co.*, 65 Fed. (2d) 997, we submit, correctly stated the law on the point at issue, stating:

> "A benefit to the promisor or a detriment to the promisee is a sufficient consideration for a contract.
>
> "The detriment need not be real; it need not involve actual loss to the promisee. The word, as used in the definition, means legal detriment as distinguished from detriment in fact. It is the giving up by the promisee of a legal right; the refraining from doing what he has the legal right to do, or the doing of what he has the legal right not to do.
>
> "And where there is a detriment to the promisee, there need be no benefit to the promisor."

Included in the authorities cited in the last-mentioned case are decisions of this Court.

The findings of the Court of Claims (Rec. 27-30) where the letters of the Contracting Officer, which contain the orders given by the Contracting Officer, are quoted, show that in compliance with these orders of the Contracting

Officer petitioners were required to perform the following acts which they were not obligated to perform under the original contract (Find. 13 to 18, both inclusive; Rec. 27-30, both inclusive).

1. To procure the lumber in question *at once, regardless of price;*

2. To make purchases upon *the approval* of the Contracting Officer;

3. To make purchases from such sources and at the prices *as directed* and approved by the Contracting officer;

4. To have the heavier timbers *fabricated;*

5. To order double the quantity required for petitioners' own use;

6. To order lumber for respondent's exclusive use on other projects.

Under the law and authorities cited, these requirements and acts on the part of petitioners were a detriment to petitioners, being requirements and acts which petitioners were not required to perform under the original contract, any one of which was a valid consideration for the promise and agreement of respondent's Contracting Officer, even if respondent received no benefit therefrom.

It will be noted that Williston on Contracts, in the excerpts hereinbefore quoted, states that the slightest trouble or inconvenience not theretofore obligatory upon the promisee, is sufficient consideration. This same rule of law was also long since announced by the Supreme Court in the early cases of *Austyn* v. *McLure,* 4 U. S. 227; *Lawrence* v. *McCalmont,* 43 U. S. 426. Clearly, what the plaintiffs were required to do upon the orders of the Contracting Officer was far more than a slight trouble or inconvenience, in the instant case. They involved expense of traveling and of

obtaining lumber *at once*, regardless of price; of ordering double the quantity required by the contract; of handling and taking care of all of this lumber—a large part of which was of no use to plaintiffs in their contract; and, then, of the risk of eventually running into a lawsuit (which has been done in the instant case), in order to get paid.

We wish to invite attention further to the fact that, in order to constitute legal consideration, it is not necessary that the promisor actually benefit. It is enough if there is any detriment suffered by the promisee, under the rule of law as announced in the cases cited, *supra*. So that even if the respondent obtained no benefit by the compliance with the Contracting Officer's orders, pursuant to the promise of the Contracting Officer, still any detriment or the slightest inconvenience to the promisee was ample consideration for the agreement of the Contracting Officer.

Respondent Received Valuable Benefits from the Compliance by Petitioners With the Orders of Respondent's Contracting Officer.

It is only necessary to look at the finding of the Court of Claims (Find. 27, Rec. 33) to conclude that the Court of Claims itself found it to be a fact that respondent received valuable benefits by compliance of petitioners with the orders of respondent's Contracting Officer. In this finding, the Court of Claims found (1) "• • • defendant secured more rapid progress on the project than would have been obtained • • •"; (2) "By such means the defendant also secured a backlog of lumber for other projects at a time when lumber was scarce and difficult to procure."

Williston states, paragraph 102 A, hereinbefore quoted, that any benefit means:

> "the receiving as exchange for his promise of some performance or forbearance which the promisor was not previously entitled to receive."

Clearly, the six forbearances and performances hereinbefore listed in detail constituted abundance of forbearance or detriment to which the Contracting Officer was not entitled under the original contract; and the securing of more rapid progress and of getting a backlog of lumber for other projects at a time when lumber was scarce and difficult to procure was not only a slight benefit but a great benefit, since this was a war contract and this Modification Center was being built to house combat airplanes, and utmost speed was essential to facilitate the war effort (Rec. 25-27, Find. 2-12, both inclusive).

In the case of *Bliss Company* v. *United States*, 70 C. Cls., 176, a somewhat similar situation arose. In that case, after the formal contract had been entered into, the Navy Department adopted a policy for increased wages and directed the contractor to put these wages into effect and, thereafter, press its claim for increased cost of performance. The point of lack of consideration of authority was raised when the case was first tried before the Court of Claims, and that Court sustained the Government's contentions (61 C. Cls. 777); but the Supreme Court thereafter reversed that Court (275 U. S. 509, 510) and held that the supplemental contracts were based upon an adequate consideration. The Court of Claims, in further discussing this matter (70 C. Cls. 200), pointed out that the Government's necessity, due to the war, gave rise to the action. Just so, in the instant case, the Government's necessities, due to the war, gave rise to the orders of the contracting officer.

The Court of Claims Is in Error in Approving the Unauthorized and Illegal Action of the Division Engineer in Setting Aside Change Order 33.

The Court of Claims held (Find. 7, Rec. 26) that from Article 3 of the Contract there was deleted before signing the usual provision of the standard Government Contract

which required changes in the contract, involving more or less than $500.00, to be approved by higher authority. This was undoubtedly done by respondent in the instant case to avoid delay because this was an urgent war contract. By deleting this provision from this Contract, respondent gave to the Contracting Officer exclusive authority under Article 3 to make changes and to reach agreement with petitioners as to such changes. Therefore, when Change Order 33, the Compromise Agreement, was drawn and signed by both parties as heretofore and hereafter shown, it became a binding contract supplemental to the original contract which no superior officer to the Contracting Officer, or any other officer for respondent, had the power to set aside.

Murray et al v. *U. S.*, 67 C. Cls. 633;
Electric Boat Co. v. *U. S.*, 66 C. Cls. 333, 370, 375;
The Arundel Corporation v. *The United States*, 96 C. Cls. 77, 114;
Standard Dredging Co. v. *U. S.*, 71 C. Cls. 218;
Phoenix Bridge Co. v. *U. S.*, 85 C. Cls. 603, 629;
United Cartridge Co. v. *U. S.*, 62 C. Cls. 214, 264.

The Court of Claims Is in Error in Setting Aside Change Order 33 Since This Change Order Was a Duly Executed Compromise Agreement.

It is petitioners' contention that, even if the Court is correct in holding that the item of excess costs of lumber of $8,303.71, which was included in the compromise agreement, Change Order 33 (Rec. 31, Court's Find. 20), bought under the Contracting Officer's orders, with promise to pay for same, was without consideration and therefore invalid, that the inclusion of this item in the compromise agreement was not a proper ground for setting aside the compromise agreement.

It has long been settled that the compromise of a doubtful claim or of a disputed or unliquidated claim is founded on a sufficient consideration. *Bank of Georgetown* v. *Geary*, 30 U. S. 99, 8 Law ed. 60, and where a claim is unliquidated or honestly in dispute, the compromise is a good consideration for any concession made. *Ansberry* v. *Harrah*, 80 Fed (2d) 381, 65 App. D. C. 80. There is no question that the claim of petitioners, that came up for final settlement and resulted in the compromise, was an unliquidated claim; that the amount of this claim was honestly in dispute between the parties; and that in the compromise petitioners accepted less than they were claiming (Rec. 30, 31, Cts. Find. 19, 20).

It is, also, well settled that the law favors a compromise of doubtful claims and the avoidance of litigation; and even though it eventually appears that if the demand had been litigated, no recovery could have been had, still the compromise of such a claim is supported by a valid consideration. *Daly* v. *Busk Tunnel Ry. Co.*, 129 Fed. 513, 521. In the case of *Trumbull Steel Company* v. *The United States*, 76 C. Cls. 391, 1 Fed. Supp. 762, the Court of Claims held that the settlement or compromise of a tax liability after the period of limitation on the Government's claim for unpaid tax had expired was valid, notwithstanding the fact that at the time of settlement the taxpayer's right to recover back sums paid was doubtful and neither party believed collection of the tax was barred. Here is a case where the situation is in reverse to the instant case; viz., a compromise is upheld by which the Government is allowed to retain taxpayers' money although the Government's right to do so is barred by the statute of limitations. In other words, in this case the Government had no legal right whatsoever to the moneys received, except by the compromise. In this case, the Court of Claims quoted

with approval from 12 C. J., p. 239, paragraph 18, as follows:

> "'It is clear, however, that the claim need not be valid in the sense that claimant be able to recover on it, and it is not material that the other party may have a good defense; or that a subsequent judicial decision may show the rights of the parties to have been different from what they at the time supposed; or that one of the parties may afterward find out that he might have obtained a judgment more favorable to him by trying out the claim on its merits.' Further, in section 19, p. 331, it is said: According to the great weight of authority, it is sufficient to support a compromise that there be an actual controversy between the parties of which the issue fairly may be considered by both parties as doubtful and that, at the time of the compromise, they in good faith so consider it. *It is not essential that the question be in fact doubtful in legal contemplation.*". (Italics ours.)

Likewise, in the same case, the Court of Claims quoted from 12 C. J., section 20, p. 332, as follows:

> "A claim as to which the doubt or dispute arises must be asserted honestly and in good faith."

Likewise, the Court of Claims quoted from 12 C. J., paragraph 21, p. 333, as follows:

> "'* * * a claim is honest if the claimant does not know that his claim is a mere nothing,'" and "'if both parties know all the facts and with knowledge of those facts obtain a compromise, it can not be said to be dishonest.'"

The Court of Claims, also, referred in the same case to the case of *Hennessy* v. *Bacon*, 137 U. S. 78, 85, 34 L. ed. 605, where this Court conceded that, if the plaintiff had

taken his case to the Courts, he must have been successful; but, having settled it, this Court said:

> "Such a settlement ought not to be overthrown, even if the Court should now be of opinion that the party complaining of it surrendered rights that the law, if appealed to, would have sustained."

We respectfully submit that this decision of this Court, if followed in the instant case, must cause a reversal of the Court of Claims' judgment in the instant case. This decision of this Court is in direct conflict with the decision of the Court of Claims in the instant case.

There is no question but that there was an honest dispute between the parties in the instant case with respect to an unliquidated claim; and that petitioners, in submitting their claim, honestly believed that they were entitled to what they claimed; and, therefore, even if a part of that claim was not legally due because of lack of consideration or any other cause, or if it developed that petitioners had no legal right to recover the item of excess cost of lumber, amounting to $8,303.71, included in the compromise agreement as the Court of Claims held, because of lack of consideration, this is not sufficient grounds for the reasons stated by this Court in *Hennessy* v. *Bacon, supra,* and other cases cited, to set aside this compromise agreement. If it was not sufficient grounds to set aside a compromise where it was to the benefit of respondent not to do so, it is certainly likewise improper to set it aside where it is not to the benefit of the petitioners to do so. This is what a compromise is for—to settle disputes and to avoid litigation. If compromise agreements are to be set aside because it was later decided by the Court that one of the parties was not legally entitled to recover on some item included in that compromise, no compromise settlement would be worth the paper

it is written on. Upon such a theory, the Court could step in and tell the parties what they could compromise and what they could not compromise.

The instant case, moreover, is much stronger in favor of petitioners than the *Trumbull Steel Company* case, *supra,* or the *Hennessy* v. *Bacon* case, *supra,* and others cited, *supra,* for the reason that in the instant case there was included in the compromise agreement an item which respondent owed petitioners for lumber which petitioners had bought for defendant's own use. There was clearly no question of consideration for that item of lumber. In the compromise, the facts developed show that petitioners made a considerable concession on this item which was unquestionably legally due petitioners. In this connection it will be noted that in the compromise agreement (Rec. 31, Court's Find. 20), there was included for this item only $2,462.25; whereas, in Revised Change Order No. 33 (Rec. 32 Court's Find. 22), the respondent by its own voluntary action conceded that there was due petitioners on this item, $5,105.87. Also, petitioners made a concession on the item of handling, in the compromise agreement, since it will be seen from the Court's Finding 20, Rec. 31, that, in the compromise agreement (Change Order 33, Court's Find. 20, Rec. 31), petitioners were allowed $2,309.64 for this item; whereas, under Revised Change Order 33, respondent voluntarily allowed plaintiffs $2,392.78 for this same item. These concessions on perfectly legitimate claims made by petitioners in the compromise agreement clearly constituted a detriment suffered by petitioners in reaching this compromise. The fact that petitioners made these concessions on these two items in the compromise agreement is absolutely proven by the fact that respondent thereafter acknowledged and actually paid petitioners more than was allowed in the compromise agreement, on both of these items.

Under the authority of the cases cited herein, including decisions of this Court, these concessions or detriments suffered by petitioners is of itself sufficient to support this compromise agreement; and the mere fact that it contained another item, which the Court of Claims holds petitioners were not entitled to, because of lack of consideration for that item, is no proper ground for setting aside this compromise settlement between the parties.

According to this Court in the *Hennessy* v. *Bacon* case, it could not be set aside for the benefit of either party, under such facts. But the Court of Claims has set aside the compromise agreement in the instant case, Change Order 33, for that very reason; namely, that it now holds that there was no consideration for one of the items included in the compromise; and, not only that, but it has not even allowed the overhead expenses in securing the lumber which petitioners bought for respondent's own use on other projects, which was certainly a legitimate item to which petitioners were unquestionably entitled and was included in the compromise agreement, but was not included in the Revised Change Order 33 (Find. 20, Rec. 31; Find. 22, Rec. 32).

In the case of *Northern Liberty Market Company* v. *Steubner,* 4 Mackey 301, 15 D. C. 301, 308, the District of Columbia Court of Appeals relied upon the decision of this Court in the case of *Northern Liberty Market Company* v. *Kelley,* 113 U. S. 199, 24 L. ed. 948. In these cases, the question was whether the original notes given by a corporation were valid or not, but this Court held it was unnecessary to express an opinion on that point because the defendant gave, in compromise of the original notes, new notes; and, in its opinion, this Court said:

> "The compromise of the disputed claim on the original notes was a legal and sufficient consideration for the

new note. Cook *vs.* Wright, 1 B. & S., 559; Tuttle *vs.* Tuttle, 12 Met., 551; Riggs *vs.* Hawley, 116 Mass. 596."

This decision of this Court is directly in point. In accordance with these decisions it is plain that in the instant case, even if the Court of Claims was correct in holding that the promise of the Contracting Officer to pay plaintiffs the excess costs incurred in the purchase of the lumber, was without consideration and, therefore, invalid, the inclusion of that claim in the compromise agreement, Change Order 33, did not affect the validity of the compromise agreement; and the Court of Claims was, therefore, in error in disregarding and holding for naught the compromise agreement Change Order 33.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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J. Roy Thompson Jr.,
Counsel for Petitioners.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 514

WILLIAM MacDONALD, JAMES J. COLEMAN, R. E. MacDONALD, O. E. SCHAEFFER, R. J. MOORE, HARRY F. WEINBERGER, AND GEORGE E. GILMORE, CO-PARTNERS, DBA TARLTON-MacDONALD COMPANY,

Petitioners and Plaintiffs Below,

vs.

THE UNITED STATES,

Respondent and Defendant Below

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

At the outset it should be emphasized that the government form of contract involved here differs from the ordinary form of contract before this Court, in that the contracting officer had sole authority to make final change orders within the general scope of the contract.

Article 3, the *Changes* provision of the standard form of government contract [1] provides that the contracting officer may by written order make changes within the general scope of the contract without approval of higher authority if the estimated amount of the change does not involve more than five hundred dollars. If the change involves more than five hundred dollars it shall not be ordered "unless approved in writing by the head of the department or his duly authorized representative."

From Article 3 of the usual form of government contract, there was deleted in this case the following provision:

> "No change involving an estimated increase or decrease of more then five hundred dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative."

The plain effect of this deletion was to make the decision of the Contracting Officer final, regardless of amount, sub-

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[1] Article 3 of the standard form of government contract is here set out, with the sentence which was deleted appearing in its proper place in italics:

"ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. *No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative.* Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed." (R. 8, 17, 26).

ject only to the right of appeal by the contractor if he does not agree with the adjustment proposed. In the event of an agreement, a binding contract arises. No one, in or out of the Government, has power to set aside such a decision, once agreed to by the contractor.

The effect of this vital and significant change in this contract is entirely misconceived by the United States in its brief in opposition, for this brief would have this Court believe that, notwithstanding the deletion, the contract should be interpreted as though *all* changes under Article 3 must be first approved in writing by the head of the department or his duly authorized representative. The brief argues that the removal of the restrictive provision has the effect of making the article more restrictive than before. To state the proposition should suffice to show its error.

Inasmuch as the emphasis on the brief for the United States in opposition is primarily upon the point that petitioner's claim is barred, regardless of its merits, because of alleged failure to take timely administrative appeal, this point will be considered first.

Question Presented

The fundamental error of the United States is apparent in its statement of the question presented on page 2 of its brief. In stating the question presented, the United States emphasizes what it alleges to be the failure of the petitioner to make timely administrative appeal procedure stipulated by the contract. What the United States overlooks is that an agreement had already been entered into between the petitioner and the Contracting Officer who was solely authorized to make such an agreement which provided for the payment sought in the suit below. No appeal was necessary or appropriate from this decision, inasmuch as petitioner had agreed to the same. Under the terms of Article 3 this was a final contract, and the United States should not

now be heard to assert that the petitioner should have appealed from any other decision.

No Appeal Was Required

The argument of the United States on page 9 of its opposition is that that timely appeal should have been taken under Article 15 of the contract as Article 3 provides,

> "If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof" (R. 8).

Assuming arguendo that the appeal provision of Article 15 governs, the fact remains that Article 15 of the contract provides for appeals for "all disputes concerning *questions of fact* arising under this contract" (Emphasis supplied, R. 14). As the United States in its opposition brief agrees that,

> "* * * failure to reach an agreement herein was based on a *question of law,* * * *" (Emphasis supplied, p. 9).

It, therefore, follows that Article 15 does not require an appeal to the head of the department upon the question of law here involved.

The United States, apparently realizing the weakness of its argument based upon Article 15, points out a provision in the specifications which, it asserts, required an appeal. This paragraph is set out in full at page 16 of the brief of the United States in opposition. It will be noted that the only time this specification comes into play is:

> "If the contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair * * *"

In this case, the Contracting Officer ruled, when he was in the exercise of his own free and unfettered judgment, that

plaintiff was entitled to be paid the amount here in controversy as set out in Change Order 33. This was a final ruling by the officer solely competent to make such ruling under the terms of the contract. The petitioner agreed to accept this sum. Obviously he would not consider the ruling to be unfair under those circumstances. There was nothing to appeal from.

The United States emphasizes that the recent case of *United States* v. *Moorman,* No. 97, this Term, decided January 9, 1950, is conclusive in its favor upon the issue here presented. Petitioner submits that this case is authority for the granting of this petition and for reversal of the Court of Claims.

In the *Moorman* case, the Court granted certiorari upon the representation of the Solicitor General, that the decision in the Court of Claims had

> "weakened and narrowed the effectiveness of the well-established policy of the Government to settle without expensive litigation, disputes arising out of contracts,"

and that the effect of such decisions was to,

> "add further doubt and confusion to the authority of designated officers of the United States to make final decisions under Government contracts."

In the case at bar, we have not only a weakening of the policy of the Government to settle, without expensive litigation, disputes arising out of the contract, but a complete reversal of that policy. Here the dispute arising out of the contract was settled between the Contracting Officer, solely authorized to act on behalf of the Government, on the one hand, and the petitioner, on the other. A final settlement and release was executed and signed by both parties (R. 31). The decision below adds doubt and confusion to the authority of officers of the United States to make final de-

cisions under the Government contracts, because, if the decision below stands, then the duly-authorized officer of the United States may never make a final decision on a matter within his exclusive power. The decision below, if allowed to stand, will be notice to all, that decisions by the officer solely authorized to make them will be final only in the event that they are not questioned by other officers of the United States even though such officers have no authority under the contract; that decisions which are agreeable to the contractor and the Contracting Officer are subject to be nullified at the whim of superior officers even though such superior officers have no responsibility or authority under the contract documents to interfere with the Contracting Officer's decision.

The Supreme Court in the case of *United States* v. *Moorman*, cited prior cases of this Court and stated:

> "They stand for the principle that parties competent to make contracts are also competent to make such agreements. The Court of Claims departed from this established principle in *McShain v. United States* (F.) 88 Ct. Cl. 284, where it refused to recognize as final the decision of a Contracting Officer, even though the Government and contractor had agreed that his decision should be final * * * Its holding was considered such a departure from the established contract law that this Court summarily reversed in a *per curiam* opinion, citing only two of the many prior cases on the subject."

The established doctrine of this Court, as thus stated, is precisely applicable to the facts of this case and support this petition. In this case the deletion of the restrictive provision in Article 3 vested full power to make changes solely with the Contracting Officer. His decision was final, unless petitioner was dissatisfied with the same, in which

event he had the right of appeal. In the *McShain* case, this Court reversed the Court of Claims because,

> "It refused to recognize as final the decision of a Contracting Officer even though the Government and contractor had agreed that his decision should be final."

In the instant case, the Court of Claims has refused to recognize as final the decision of the Contracting Officer, even though the Government and the contractor had agreed that his decision should be final. Under the doctrine of prior cases and as re-affirmed in *United States* v. *Moorman,* the Court of Claims should be reversed so that the decision of the Contracting Officer will be given the effect which was intended by the parties to this contract. The *Moorman* case compels reversal.

It must be obvious in this case that the appeals provision has no application, inasmuch as the petitioner entered into a formal contract with the Contracting Officer, to be paid as provided for in Change Order 33; and, therefore, there was nothing for him to appeal from. It would be a strange doctrine, indeed, which would require a contractor with the United States to appeal from all decisions of the Contracting Officer, whether or not he was dissatisfied with them, in order that he would thus be protected against the possibility that a superior officer, but one who under the contract had no authority regarding the same, would direct the abrogation of the contract.

In any event, under a familiar rule of construction if there is ambiguity in the contract the ambiguity must be resolved against the party who drew the contract, that is the United States.

The Contracting Officer Had Sole Authority

The United States asserts that Article 3 of the contract provides that the adjustment or payment for all changes

must be made by the Contracting Officer only after approval of the head of the department or his duly-authorized representative. From this premise, the United States argues that, inasmuch as there was no approval by the head of the department or his duly-authorized representative for payment for the work done by petitioner at the written direction of the Contracting Officer, no payment can be made to petitioner. What the United States disregards is the effect of the deletion from Article 3 of this contract of the customary words that no change involving an estimated increase of more than $500 would be ordered, unless approved in writing by the head of the department or his duly-authorized representative (R. 26). No claim has been made, or is made, by the United States, that this deletion was without the power of the parties. It must follow that the deletion of this provision had some effect upon the power of the Contracting Officer to make changes without the approval of the head of the department first had in writing. The position that the United States has taken in this argument is that, notwithstanding the power of the Contracting Officer to order without limit as to amount, changes in the contract, as set out in Article 3 as here amended, nevertheless, payment therefor must be approved in writing by the head of the department before the United States is obligated to pay for the ordered change. This is legal legerdemain. The obvious purpose of deleting this provision in the standard form contract was to enable the Contracting Officer to expedite this urgent war contract, which was to be completed within sixty days of the date of acceptance (R. 8), and to eliminate delays required by necessity to secure approval of the head of the department for changes. The argument of the United States, if embraced, would lead to the result that all changes, no matter whether insignificant or great, would be required to be approved in writing by the head of the department before payment could

be made therefor. This is just exactly the opposite of the intention of the parties.

A reading of Article 3 of the Contract (R. 8-9) shows that the United States has torn from its context the provision requiring the approval of the head of the department and applied it to the facts in this case when it is inapplicable. Article 3 in the first two sentences sets out the power of the Contracting Officer to make changes, to make an equitable adjustment therefor, and to modify the contract in accordance with the changes and the adjustments. These powers are complete in themselves. The third sentence of Article 3 provides that claims for adjustments under the Article must be asserted within ten days from the date the change is ordered. This sentence also contains a proviso as follows:

> "* * * That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract." (R. 8)

It is plain that this proviso relates only to procedures to be followed in order to waive the ten-day period for an adjustment and is not a requirement when no waiver of time is needed. The United States in its brief erroneously concludes that this approval of the head of the department is required in all cases. In the instant case there was no necessity to make a claim for adjustment within ten days of the order for the changed work because plaintiff was agreeable to the equitable adjustment proposed and agreed upon between the parties as set out in Change Order 33. The United States contends that it was under this proviso that the Contracting Officer undertook to make the adjustment in the instant case, which adjustment was abortive

because his superior officer failed to approve the same. The fact is that the Contracting Officer did not undertake to make an adjustment under the proviso but undertook to, and did, make an adjustment under his powers granted in the first two sentences of Article 3. There was no dispute between the parties. The adjustment was equitable and was made by parties competent to enter into a contract and is, therefore, final and binding upon both the United States and the petitioner, and petitioner should be paid the sums there agreed upon.

In a footnote to its argument, under paragraph numbered 1 (p. 6), the United States questions the power of the Contracting Officer under Article 3, to order the petitioner to perform as he did in this case. In passing, it may be remarked that the United States has not, until now, challenged the authority of the Contracting Officer to order these changes under Article 3. This argument proves too much. The United States does not challenge the authority of the Contracting Officer generally to bind the United States in contract. It is said only that he may not do so under Article 3. Being competent to make a contract and bind the United States, it would follow that if the work he ordered the petitioner to perform was not within his power under Article 3 of the basic contract, it was within his general power to make a binding contract. The fact is he ordered in writing the work here performed. The petitioner performed the work. The United States received the benefit of the work, and, if not done within the terms of the basic contract, then an entirely new contract arose between the parties. This new contract was written and formalized in Change Order 33, as signed and agreed upon by the Contracting Officer and the petitioner. This new contract had no appeals provisions or any other provisions which would have required the petitioner to pursue any specific remedies. It, therefore, follows that, if the United

States is correct in asserting that the Contracting Officer had no power to order done what he did order done under Article 3 of the basic contract, he did have that general power as a Contracting Officer. He exercised that general power. The petitioner correctly recognized his authority and performed under his written directions. As no technical forms of appeal or other procedures were required under the new contract, it is submitted that no higher authority had the power to refuse to recognize the new contract after performance any more than it could have repudiated the whole basic contract after the work was performed. This argument of the United States logically supports petitioner.

The foregoing paragraphs demonstrate the fallacies of each of the two arguments advanced by the United States in paragraph numbered 1 (pp. 6, 7) of its brief. In addition, however, it should be noted that the two arguments are mutually self-defeating. The United States first argues that the petitioner has no standing because the approval of the head of the department was not obtained for the adjustment or payment here in controversy, as required by Article 3. In other words, petitioner was bound to follow the requirements of Article 3 (as erroneously interpreted by the United States) or lose its right of recovery for work performed for the United States. Yet the government then argues that the work done was not within the power of the contracting officer to order under Article 3. If this is so, how can approval or disapproval of the head of the department sanctify an unauthorized act? The argument must fall.

There Was Consideration

On page 7 of the brief in opposition, appears the conclusion that the petitioner did no more than it was required to under the contract and, therefore, there was no consideration to support the contract and petitioner should

not be paid for what it did. This is the only answer of the United States to the petitioner's legal argument that there was consideration for the agreement entered into between the parties. This point has been covered fully in petitioner's original brief herein (pp. 13-22), and will not be repeated. In passing, it is remarkable that neither in the brief of the United States in the Court below, in the opinion of the Court below, or in the brief filed herein in opposition, has there been a single case or principle of law cited to uphold this novel and unusual conclusion urged by the United States. The United States argues, and the Court of Claims sustained the argument, that, because a lump-sum contractor is required to purchase the lumber that goes into a construction job, the United States, on the ground of lack of consideration, may escape payment of excess costs incurred solely as a result of following written commands by the Contracting Officer to order double the quantities of lumber required for petitioner's own use, to purchase lumber for the exclusive use of the United States to be used on other projects, to require certain timbers to be fabricated, to procure the lumber at once and, regardless of price, when none of these things was required by the contract. And this, even though the Contracting Officer wrote petitioner,

> "* * * You will not be hurt financially by these orders, *making* you purchase at once wherever you can get these items" (Emphasis supplied, R. 30).

The Court below found as a fact that:

> "By reason of the plaintiff's compliance with defendant's instructions to make duplicate purchases of lumber, the defendant secured more rapid progress on the project than would have been obtained had the plaintiff waited for deliveries of the purchases made through the Central Procurement Agency. By such means the defendant also secured a backlog of lumber for other projects at a time when lumber was scarce and difficult to procure" (R. 33).

The Court below found as a fact that the United States received a benefit from petitioner's compliance with the orders of the Contracting Officer. For the Court below to conclude then, as a matter of law, that there was no consideration for the carrying out of these orders of the Contracting Officer, is to fly in the face of every statement of contract law upon the subject by text writers or by the Courts of the United States. It is no wonder that no cases are cited to support this conclusion. If this decision stands, it will be the sole decision of this character in the books. It will stand as a beacon for all who desire to escape from lawful obligations and will be used to defeat all who, in good faith, have heretofore relied upon the principles of consideration, as have been uniformly laid down in our system of jurisprudence. It will stand as a warning to all who deal with the United States in reliance upon the integrity of its officers and of its contracts. It will be a solace to defaulters. It is not the law.

There Was a Compromise Agreement

In paragraph 1 b of its brief (p. 8), the United States attempts to avoid the legal consequences of the fact that there was a dispute between the parties respecting the amount due petitioner, which dispute was resolved by the execution of Change Order 33. The Court below found as a fact (p. 31):

> "There was a disagreement between the contracting officer and the plaintiff as to the correct amount of the adjustment. The plaintiff claimed in the neighborhood of $25,000 and the contracting officer's figure was approximately $15,000. Thereupon a conference was held between the parties and an agreement was reached for an adjustment in the sum of $17,363.27 * * *."

These facts spell out a compromise agreement. Again, neither the United States in any of its briefs, nor the Court below in its opinion, cites a single case or text-writer to sup-

port its conclusion that a compromise agreement fully and fairly entered into can be set aside for lack of consideration. Petitioner, in its brief (pp. 22-28), covered this point and cited a uniform line of decisions supporting its position that this contract is enforceable.

In all Court of Claims litigation, the United States asserts and reasserts that those devices used by the contractors and the United States to settle differences between the parties and to avoid expensive and protracted litigation, should be encouraged. In the instant case, the parties by the use of the give-and-take, which is to be desired in cases of controversy, arrived at a figure which was satisfactory to both the Contracting Officer, duly authorized to represent the United States, and the petitioner. The brief of the United States on this point consists merely of the statement of the conclusion that no valid compromise adjustment was ever reached, and flies in the face of the facts found by the court below.

In numbered paragraph 1-b of its argument (p. 8), the United States again perpetuates its original error in stating that Article 3 of the standard form of contract, as amended in this case by the deletion of the provision that no change involving estimated increase of $500 would be ordered unless approved by the head of the department or his duly-authorized representative, nevertheless requires all changes to be approved in writing by the head of the department or his duly-authorized representative. The fallacy of this argument has been heretofore demonstrated.

The United States in the same paragraph states as a fact that the Division Engineer who ordered the successor Contracting Officer to repudiate the original agreement was the duly authorized representative of the head of the department (p. 8). The United States cites no reference to the findings of the Court of Claims or even to the record below to support this conclusion, nor can it. This Court must

take the facts as shown by the record. There is not a single word of evidence or of fact which supports this conclusion. The fact is that, after the Contracting Officer and petitioner entered into the Change Order 33, under which they compromised the respective claims of the parties, the Division Engineer, the superior officer of the Contracting Officer, disallowed the payment on the ground that petitioner had done nothing more than he was required to do under the contract (R. 31, 32). There is nothing in this record to suggest that the Division Engineer had any authority over or responsibility concerning the Contracting Officer's performance of his duty under this contract, except that he was a superior Army Officer in the chain of command. The Contracting Officer under the basic contract had sole power to order the petitioner to perform as he did and no one could dictate the manner in which he exercised that power. Change Order 33 was forwarded through the Division Engineer because that was the normal channel for communication. The Division Engineer, not as the duly authorized representative of the head of the department, but as an Army officer superior, in grade, ordered the successor Contracting Officer (the original having been transferred) to reverse the prior Contracting Officer and, as a soldier, the Contracting Officer did so. The result of this interference with the Contracting Officer's function, by an individual who had absolutely no responsibility or authority, was to deprive the petitioner of the unfettered and considered judgment of the Contracting Officer. It is fundamental under Government contracts that the individual who is charged with the duty of decision must make that decision. *Goltra* v. *U. S.*, 91 C. Cls. 42, 72; *Burton Coal Co.* v. *United States*, 60 C. Cls. 294, affd. 273 U. S. 337; *Lutz Co.* v. *U. S.*, 76 C. Cls. 405; *Sun Shipbuilding Co.* v. *U. S.*, 76 C. Cls. 154; *Helvetia Milk Condensing Co.* v. *U. S.*, 74 C. Cls. 142; *Williams Eng. & Const. Co.* v. *U. S.*, 55 C. Cls. 349; *Michael H. King* v. *U. S.*, 37 C. Cls.

428. The decision so made by the Contracting Officer was acceptable to petitioner. The decision dictated by another, a stranger to the contract, was no decision, under the law, and a nullity. Under law, petitioner is entitled to the benefits of the decision of the party in whose sole hands the power of decision was vested by the express terms of the contract. The decision below stripped the parties of this right and for that reason alone it should be reversed.

First War Powers Act Is Applicable

In numbered paragraph 2 of its brief, the United States argues that the First War Powers Act and Executive Order 9001 have no application to this case (pp. 8-9).

This is the most amazing argument of all. Its audacity transcends belief. The fact is that the contract was entered into pursuant to the authority of the First War Powers Act and Executive Order 9001. On the cover sheet of the contract itself appears this language:

> "This contract is authorized by the following laws: Section 1(a), Act of July 2, 1940 (Public No. 703, 76th Congress), as continued in effect by Sec. 9, Act of June 30, 1941 (Public Law 139, 77th Congress), Title II of the First War Powers Act, 1941, Act of December 18, 1941, (Public Law 354—77th Cong.), and Executive Order No. 9001, dated—December 27, 1941." (Def. Ex. 8, Pl. Ex. 3)

Notwithstanding this express recital of power the United States for the first time here asserts that there was a want of power in the Contracting Officer under this Act and Order to make the contract expressed in Change Order 33. The officer in the War Department who drew the contract thought it was authorized by the First War Powers Act and the Executive Order. The officer who executed it for the United States thought so, and the War Department has never denied the authority lodged in its officers. The

action of the War Department in recognizing all obligations under the contract, except the point here at issue, amounts to a ratification of authority, and the United States is now estopped to deny the same. This is a belated attempt to avoid the plain consequences of the authorized acts of its officers.

Assuming, however, that further answer is needed on this point, petitioner asserts that the United States is in error in asserting that there was a lack of delegation under the Act and Order. We have shown that there was an express statement of authority written into the contract. Without the express authority, the delegation would be implied under the law and facts. Section 201 of the First War Powers Act, 55 Stat. 839, 50 U. S. C. App. 611, provides that the President may authorize any "department or agency of the Government" to enter into war contracts. The delegation, it should be noted, is to the Department, not the head of the Department. Paragraph 3 of Executive Order 9001 authorizes "The War Department" to amend or modify war contracts "with or without consideration." The delegation is to the Department, not to the individual. The War Department acts through its officers. The Contracting Officer here was an officer of the War Department. The lawful act of the subordinate is presumed to be the act of the Department. *Medkirk* v. *U. S.*, 45 C. Cls. 395, 403; 6 op., Atty. Gen. 583, 587. *Roxford Knitting Co.* v. *Moore & Tierney*, 265 F. 177, 190, cert. den. 253 U. S. 498. The action of the first Contracting Officer was authorized under the Act and Order.

In any event, the First War Powers Act and Executive Order 9001 only serve to avoid the lack of consideration asserted by the United States. It has been amply demonstrated that there was consideration for the contract and there is no necessity to support the contract, as may be done, by resort to these provisions.

In passing it is not unworthy of note that the court below resolved this important point by ignoring it entirely in its opinion. Not a single word appears in the opinion to indicate whether it was even considered or, if considered, what conclusions were reached in the premises.

Conclusion

The issues presented in this case go to the integrity of governmental contracting procedures. If the Government can in war-time obtain from contractors a back-log of lumber to be used on other Governmental projects at a time when lumber was scarce, if the Government can obtain through war contractors the completion of a project sooner than would otherwise have been required by the terms of the contract, if the Government can require contractors to procure lumber through certain sources, regardless of cost, immediately, and only after authorized by the Contracting Officer, all in a manner not required by the basic contract, and, then, after so doing, be sustained by the Court of Claims in refusing to pay that which the Contracting Officer and the contractor agree is a fair price for the work, then let this Court proclaim that this is the law, in order that all who deal with the Government in peace, as well as in war, may be put on notice and may, in the future, protect themselves by increasing their bids for Government contracts, over those which would be normal between contracting parties whose rights are governed by commonly-accepted standards of law. The petition should be granted so this court may state the law on this fundamental point.

Respectfully submitted,

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Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 514

WILLIAM MACDONALD, JAMES J. COLEMAN, R. E. MACDONALD, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 25-39) is reported at 83 F. Supp. 702.

JURISDICTION

The judgment of the Court of Claims was entered on May 2, 1949 (R. 39). A motion for a new trial, filed on June 22, 1949 (R. 40), was overruled on October 3, 1949 (R. 40). The petition for a writ of certiorari was filed on December 29, 1949. The jurisdiction of this Court is presumably invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the revised change order, eliminating an allowance for excess cost of lumber on the ground that no consideration existed for the agreement of the contracting officer to pay therefor, was valid and binding on petitioners, particularly in view of the fact that they failed to invoke the administrative appeal procedure stipulated by the contract within the prescribed time.

STATUTE AND CONTRACT PROVISIONS INVOLVED

Section 201 of the First War Powers Act, 55 Stat. 839, 50 U. S. C. App. 611, Executive Order 9001, 6 F. R. 6787, and the provisions of the contract are set forth in pertinent part in the Appendix, *infra*, pp. 12-16.

STATEMENT

On May 19, 1942, petitioners and the United States executed a lump sum contract on a standard government form for the construction of a modification center for airplanes at Fort Crook, Nebraska. By its terms, petitioners agreed to furnish all plant, labor and materials, tools, supplies and equipment, and to perform all work required to carry out the contract (R. 26). The work was to be completed within sixty days of the date of the acceptance of Letter Contract (R. 8).

In submitting their bid, petitioners stipulated that they should be furnished all priority required to enable them to obtain material and equipment without delay (R. 25). Petitioners then entered into a contract with the Nebraska Building Supply

& Lumber Company of Omaha, Nebraska, to furnish the lumber necessary for the performance of the contract (R. 26). Since the lumber required was difficult to obtain in required quantities because of market conditions, petitioners secured permission from respondent's contracting officer to purchase lumber through the Central Procurement Agency, an agency set up by the United States to procure materials for government projects. However, deliveries of lumber purchased through the Central Procurement Agency were also slow in arriving and it became apparent that completion of the project would be delayed. Accordingly, the contracting officer instructed petitioners to procure lumber from other sources wherever possible, without cancelling its previous orders through the Central Procurement Agency, even though such action resulted in duplicate orders. (R. 27.) Petitioners were advised by the contracting officer in several letters that petitioners would be reimbursed for the difference in cost above Central Procurement prices and that duplicate lumber obtained by petitioners through the Central Procurement Agency would be taken over by the Government at invoice prices (R. 27-30).

Upon completion of the contract work on November 6, 1942, and acceptance as of October 14, 1942, a disagreement arose as to the correct amount of the adjustment to be made. Agreement was finally reached on the sum of $17,363.27, and the contracting officer issued a change order (Change

Order 33), signed by him and petitioners (R. 30-31). This sum included an adjustment both for the excess cost of lumber procured from other sources and for the cost of duplicate lumber obtained through the Central Procurement Agency (R. 31).

Thereafter, the Division Engineer, the contracting officer's superior, disallowed the excess cost on the ground that it was petitioners' obligation, under the contract, to secure the lumber from whatever source it could be obtained and at whatever price it was necessary to pay for it, and that petitioners had, therefore, done nothing more than they were required to do (R. 31-32, 38). Accordingly, a revised change order was issued, eliminating the adjustment for excess cost (R. 32). Payment was received by petitioners on the basis of the revised change order and was accepted under protest (R. 32).

On June 19, 1943, petitioners wrote the contracting officer that they would not sign the revised change order and requested further consideration. On June 23, 1943, petitioners were informed by letter that their letter of June 19 was regarded as a complete refusal to sign the revised change order and that the change order would be distributed to higher authorities unsigned, in accordance with Article 3 of the contract. The letter further advised petitioners of their right to appeal pursuant to Article 15 of the contract. (R. 32.)

Although Article 15 expressly requires an appeal to be taken within thirty days, no appeal was filed

until August 14, 1943 (R. 32). Accordingly, the Board of Contract Appeals of the War Department, the duly authorized representative of the Secretary of War, dismissed the appeal as untimely (R. 33).

The Court of Claims dismissed the petition on two grounds: (1) Since petitioners did no more under the contract than they were required to do, the original change order allowing petitioners the excess cost of lumber was unenforceable for want of consideration; (2) Petitioners failed to perfect their appeal to the head of the department within the thirty days required by the contract (R. 38-39).

ARGUMENT

Petitioner's argument runs as follows: Article 3 of the standard form Government contract gives to the contracting officer exclusive authority to make changes in the contract and to adjust claims arising from changes (Pet. 3, 5, 6, 12, 20); the First War Powers Act (55 Stat. 839) and Executive Order 9001 (6 F. R. 6787), promulgated thereunder, eliminates the necessity for legal consideration to support a modification of the contract (Pet. 10-13); there was consideration for the change made herein (Pet. 13-21); in any event, a valid compromise agreement (Change Order 33) was executed under Article 3 by petitioners and the contracting officer (Pet. 21-28). None of these contentions has merit. Moreover, the petition completely ignores the alternative basis for decision below,

namely, that petitioners did not take a timely appeal under the administrative appeal provisions of the contract to the Secretary of War. We submit, therefore, that there is no occasion to review the judgment below.

1. Petitioners misapprehend the provisions of Article 3 of the contract, apparently because there was deleted therefrom the customary provision that no change involving an estimated increase of more than five hundred dollars would be ordered unless approved in writing by the head of the department or his duly authorized representative (R. 26). While Article 3 provides that the contracting officer may make changes in the plans and specifications and that an equitable adjustment shall be made if the change results in an increase of the amount due under the contract, provided that the claim therefor is made within ten days,[1] it also provides that where the claim is made "at any time prior to the date of final settlement", the adjustment could be

[1] It is highly doubtful that Article 3 envisages the modification of the contract here attempted. That article simply permits the contracting officer to "make changes in the drawings and/or specifications of this contract and within the general scope thereof." Herein, the contracting officer did not change the drawings or specifications, he changed the contract price. We know of no provision in the standard form Government contract which authorizes such a modification of the contract. It is, of course, a familiar rule that the United States is neither bound nor estopped by the unauthorized acts of its officers or agents. *United States* v. *Stewart*, 311 U.S. 60; *United States* v. *City and County of San Francisco*, 310 U.S. 16; *Wilber National Bank* v. *United States*, 294 U.S. 120; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389; *United States* v. *Chickasha Cotton Oil Co.*, 115 F. 2d 135 (C.A. 10); *United States* v. *Thomas*, 107 F. 2d 765 (C.A. 5).

made by the contracting officer only with the approval of the head of the department or his duly authorized representative. It was under this last clause that the contracting officer undertook to make an adjustment in the instant case which his superior refused to approve. In those circumstances, petitioners were required by the explicit language of Article 3 to proceed as provided in Article 15, if they desired further review.

a. We think it unnecessary to labor the point that the contracting officer's superior was correct in holding that petitioners did no more under the contract than they were under an obligation to do. As the court below observed (R. 38):

> * * * Plaintiff was required to secure the lumber from whatever source it could obtain it and to pay therefor whatever price it had to pay. Plaintiff's contract was for a lump sum and it was required to do whatever might be necessary in order to perform it.
>
> * * * It was no part of the contract that plaintiff should secure this lumber through the Central Procurement Agency. * * * when it developed that sufficient lumber could not be secured from this source, it was its obligation under the contract to get it wherever it could at whatever price it had to pay for it.
>
> It follows from this that the Government received from the plaintiff no more than it was entitled to receive and, therefore, that the change order allowing plaintiff more than it was entitled to under the contract was without consideration and, therefore, is unenforceable.

b. Nor is extended discussion necessary to refute petitioners' contention that a binding compromise agreement was effected under Article 3. As noted above, adjustments of claims arising from changes can be made only "with the approval of the head of the department or his duly authorized representative." Here, the Division Engineer, the duly authorized representative of the head of the department, expressly disapproved of the adjustment. It is plain, therefore, that no valid compromise adjustment was ever reached.

2. Apparently realizing the vulnerability of their argument based on Article 3, petitioners urge that, in view of the First War Powers Act and Executive Order 9001, consideration was not a requisite to the modification of their contract. Unquestionably, if the change herein made was undertaken in the exercise of authority properly delegated under the First War Powers Act, no consideration was necessary. However, that act is not self-executing. It does not purport to subject all wartime Government contracts to its provisions. It comes into play only where an official to whom authority has been delegated, deems it not to be incompatible with the public interest to exercise that authority. That delegation of authority under the Act is essential to the exercise thereof is demonstrated by the action of the President in specifically delegating such authority to various departments and agencies (50 U. S. C. A. App. 611, pp. 242-247). There is nothing

in the record to indicate that, during the period here involved, any power under the act was delegated to the contracting officer herein. In fact, no such power was delegated during this period to any administrative official of the War Department subordinate to the Director, Purchase Division, Headquarters, Army Service Forces. See 7 F. R. 9268-9270; 10185. We submit, therefore, that the First War Powers Act has no application.

3. Finally, petitioners' claim is barred because of their failure to take a timely administrative appeal to the Secretary of War, or his duly authorized representative. As already noted, petitioners' claim rests upon the authority delegated to the contracting officer under Article 3. That article provides that "if the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof." Although failure to reach an agreement herein was based on a question of law, we agree with the court below that Article 3 required petitioners to appeal to the Secretary of War. In incorporating the appeal procedure of Article 15, Article 3 does not purport to limit that procedure to questions of fact. Apart from Article 3, however, resort to an administrative appeal was required by paragraph 1-11 of the specifications of the contract (*infra*, p. 16), which provides for such appeal—

> If the contractor considers any work demanded of him to be outside the requirements

> of the contract or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair, * * *

In *United States* v. *Moorman,* No. 97, this Term, decided January 9, 1950, this Court held an identical provision to be valid and binding whether the dispute be one of law or fact. And see *United States* v. *Holpuch Co.,* 328 U. S. 234; *United States* v. *Beuttas,* 324 U. S. 768; *United States* v. *Blair,* 321 U. S. 730; *United States* v. *Callahan-Walker Constr. Co.,* 317 U. S. 56; *United States* v. *McShain, Inc.,* 308 U. S. 512; *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387; *Plumley* v. *United States,* 226 U. S. 545; *United States* v. *Gleason,* 175 U. S. 588; *Martinsburg & Potomac R. R.* v. *March,* 114 U. S. 549; *Kihlberg* v. *United States,* 97 U. S. 398. This Court has repeatedly held that "in the absence of some clear evidence that the appeal procedure is inadequate or unavailable, that procedure must be pursued and exhausted before a contractor can be heard to complain in a court." *United States* v. *Holpuch Co., supra,* at 240; *United States* v. *Blair, supra; United States* v. *Callahan-Walker Constr. Co., supra.* Having failed to file a timely appeal, petitioners' claim is barred.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1950.

APPENDIX

1. Section 201 of the First War Powers Act, 55 Stat. 839, 50 U. S. C. App. 611, provides:

> The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: *Provided,* That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting; *Provided further,* That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: *Provided further,* That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest.

2. Executive Order 9001, 6 F. R. 6787, provides in pertinent part as follows:

> TITLE I
>
> 1. By virtue of the authority in me vested by the Act of Congress, entitled "An Act to expedite the prosecution of the War effort",

approved December 18, 1941, (hereinafter called "the Act") [sections 601 et seq. of Appendix to Title 50] and as President of the United States and Commander-in-Chief of the Army and Navy of the United States, and deeming that such action will facilitate the prosecution of the war, I do hereby order that the War Department, the Navy Department, and the United States Maritime Commission be and they hereby respectively are authorized within the limits of the amounts appropriated therefor to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts. The authority herein conferred may be exercised by the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission respectively or in their discretion and by their direction respectively may also be exercised through any other officer or officers or civilian officials of the War or the Navy Departments or the United States Maritime Commission. The Secretary of War, the Secretary of the Navy, or the United States Maritime Commission may confer upon any officer or officers of their respective departments, or civilian officials thereof, the power to make further delegations of such powers within the War and the Navy Departments, and the United States Maritime Commission.

* * * * *

3. The War Department, the Navy Department, and the United States Maritime Commission may by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may make advance, progress, and other payments upon such contracts of any percentum of the contract price, and may enter into agreements with contractors and/or obligors, modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds, whenever, in the judgment of the War Department, the Navy Department, or the United States Maritime Commission respectively the prosecution of the war is thereby facilitated. Amendments and modifications of contracts may be with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished hereunder, irrespective of the time or circumstances of the making of or the form of the contract amended or modified, or of the amending or modifying contract, and irrespective of the rights which may have accrued under the contract, or the amendments or modifications thereof.

* * * * *

3. Article 3 of the contract (R. 8-9) provides:

Article 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the

amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

4. Article 15 of the contract (R. 14) provides:

Article 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

5. Paragraph 1-11 of the specifications of the contract provides:

1-11. *Claims, Protests and Appeals.* If the contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair, the contractor shall without undue delay, upon such demand, action or ruling, submit his protest thereto in writing to the contracting officer, stating clearly and in detail the basis of his objections. The contracting officer shall thereupon promptly investigate the complaint and furnish the contractor his decision in writing, thereon. If the contractor is not satisfied with the decision of the contracting officer, he may, within thirty days, appeal in writing to the Secretary of War, whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions or decisions of the contracting officer shall be final and conclusive. All appeals from the decisions of the contracting officer authorized under the contract shall be addressed to the Secretary of War, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the contractor bases his claim for relief and should be presented to the contracting officer for transmittal within the time provided therefore in the contract.

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